

found that such a loan commitment ever existed.

B. The Actual Availability of Any Loan Commitment
From Mr. Conant, November, 1990 - June, 1991

89. Even if the evidence supported a finding that some financing agreement did exist between RBC and Mr. Conant at some time, the evidence unequivocally demonstrates (a) that no financing was in any event available to RBC from Mr. Conant during the period November, 1990 - June, 1991, and (b) that Mr. Rey was well aware of that fact.

90. In its November, 1990 Complaint initiating the Miami Tower Litigation, RBC (over Mr. Rey's sworn signature), stated that, if Press were allowed to install its antenna at the 1500-foot level of the Gannett tower:

[RBC] will be unable to secure financing to build and operate the station. . . .

[RBC]'s ability to compete in the Orlando television market will be obstructed to the point that it will not be able to secure the financing to build a television station for Channel 65 or any other tower in the area. . . .

No financing will be available to build and operate [RBC's] station, given that it is not economically viable, and the station will never be built.

Press Exh. 9, pp. 12-14. Mr. Rey, in his testimony in the instant hearing in June, 1996, specifically re-stated his agreement with these statements. Tr. 753, 780-81, 938.

91. During his January, 1991 testimony in the Miami Tower Litigation, Mr. Rey was questioned about the availability of funding to RBC, and, particularly, the availability of financing from Mr. Conant. Press Exh. 10, pp. 6-9. According to Mr. Rey's

January, 1991 testimony,

[Mr. Conant] has told me if [Press] gets on that tower, the likelihood is that he will not finance the station.

Id. He also testified in January, 1991 that, as of that date, "everything had been put on hold." Press Exh. 10, p. 7.

92. In the Conant Declaration, Mr. Conant effectively confirmed Mr. Rey's January, 1991 testimony. According to his Declaration, Mr. Conant told Mr. Rey, in December, 1990, that Mr. Conant "would take a wait and see attitude" in light of the possibility that RBC's station might not be the fifth station in the market. Rainbow Exh. 4, p. 1. The Conant Declaration specifically states that, during that late 1990 meeting, Mr. Conant "was concerned about the problems that [Mr. Rey] raised and particularly the prospect of another market television station." Id.

93. All of the evidence described in the immediately preceding paragraphs indicates that, to the extent that any loan may have ever been available from Mr. Conant, that loan was not available at least during the period November, 1990-June, 1991, i.e., the period during which RBC was seeking injunctive relief in the Miami Tower Litigation to keep Press from relocating Channel 18 to the Gannett tower. During that period, any arrangements between RBC and Mr. Conant were "on hold" pending some resolution of the question of whether RBC's would be the fifth or sixth station in the market. Press Exh. 10, p. 7; Rainbow Exh. 4, p. 1. Moreover, the evidence clearly demonstrates that Mr. Rey was aware of that situation: he

personally signed RBC's November, 1990 Complaint (Press Exh. 9) reciting RBC's lack of financing, and, in January, 1991 he specifically and expressly testified that RBC's financing was "on hold" and not likely to be available (Press Exh. 10, pp. 7-9).

94. In their June, 1996 testimony herein, both Mr. Rey and Mr. Conant seemed to contradict the evidence described above, as both witnesses suggested that Mr. Conant's commitment to provide funds was in place and available to RBC at all times -- e.g., Tr. 754 (Mr. Conant "was still on board"), Tr. 690 (Mr. Conant "was ready to finance the station"). Notwithstanding this, the testimony of both Messrs. Rey and Conant confirms that any commitment which Mr. Conant may have made was not available during the period November, 1990-June, 1991.

95. As an initial matter, during his June, 1996 testimony herein, Mr. Rey confirmed the truthfulness of his January, 1991 testimony in the Miami Tower Litigation, i.e., that Mr. Conant's financing was "on hold" and that Mr. Conant had told Mr. Rey that, if Press were allowed to operate from the 1500-foot level of the Gannett tower, "the likelihood is that [Mr. Conant] will not finance the station" (Press Exh. 10, p. 9). E.g., Tr. 921, 927. And, as noted above, also in his June, 1996 testimony herein Mr. Rey confirmed the truthfulness of the statements contained in the Complaint signed by Mr. Rey in the Miami Tower Litigation, statements to the effect that RBC did not have, and would not be able to secure, financing. See, e.g., Paragraph 90, above; Tr. 776-782.

96. In his June, 1996 testimony concerning these matters, Mr. Rey seemed to be trying to avoid the obvious consequences of his earlier statements by claiming that, in those earlier statements, he was "mixing up two thoughts in my mind when I answered the question". Tr. 921. Contrary to his 1991 testimony that Mr. Conant had told Mr. Rey that it was unlikely that Mr. Conant's financing would be available and that that financing was "on hold", it appeared that Mr. Rey was now, in 1996, trying to claim that Mr. Conant had not really told him that. E.g., Tr. 920-22; 926 ("When I met with [Mr. Conant] in December of 1990, he didn't say to me, 'Let's put the deal on hold'.") ^{26/}; 927 (Mr. Conant "never . . . put on hold his commitment to finance the station").

97. Mr. Conant seemed similarly intent upon evading his own earlier statements. For example, in the Conant Declaration, Mr. Conant had stated that he recalled that, during his December, 1990 meeting with Mr. Rey,

I was concerned about . . . prospect of another market television station. I recall telling [Mr. Rey] that I would take a wait and see attitude. . . .

Rainbow Exh. 4, p. 1. This recollection was generally consistent with Mr. Rey's 1991 testimony. But in 1996, in testifying in the

^{26/} The credibility of that particular claim is questionable in view of Mr. Rey's testimony two sentences later, i.e., that Mr. Conant "told me he would not finance the station, you know, if it was worthless." Tr. 926. In light of that latter admission and Mr. Rey's repeated testimony that RBC's project was, in Mr. Rey's view from November, 1990 - June, 1991, worthless, it is not clear how Mr. Rey could maintain that RBC had any financing at all during that period.

instant proceeding, Mr. Conant tried to backtrack on his earlier statements. According to Mr. Conant's current version,

I was always ready to finance the stat[ion] when I was told that they had the full authority to proceed to build it. . . .

. . . I reiterated my position that I would finance the station, but once again as I have said before, when the station was cleared to be constructed finally.

Tr. 684-85.

98. The Presiding Judge, perceiving inconsistencies between Mr. Conant's Declaration and his testimony, explored the discrepancies with Mr. Conant. Mr. Conant's responses were confused and confusing, and did nothing to shore up Mr. Conant's credibility. E.g., Tr. 685-87. ^{27/}

99. The transparent efforts by Mr. Rey and Mr. Conant to change their testimony to fit RBC's needs ^{28/} were unconvincing

^{27/} The gist of Mr. Conant's position in his testimony seemed to be that his commitment to fund RBC was contingent on RBC receiving a "final" construction permit. E.g., Tr. 687. But, as the Presiding Judge pointed out to Mr. Conant, RBC had received a final permit from the Commission as of August, 1990. Tr. 688-89. Asked what else might have precluded Mr. Conant from lending RBC the funds, Mr. Conant answered, "No, that is not -- I don't know the answer to that." Tr. 689. And, while Mr. Conant still attempted to advance the claims that Mr. Conant had not put anything on hold and had not taken a "wait and see" approach, Tr. 691, those claims were plainly inconsistent with Mr. Conant's own Declaration (prepared by him in February, 1996). When those inconsistencies were noted by the Presiding Judge, Mr. Conant seemed to retreat back to his Declaration. Tr. 693 ("It's [my declaration] and I'll stand on it.").

^{28/} In the Miami Tower Litigation, where RBC had to demonstrate likely irreparable injury in order to obtain the injunctive relief it was seeking, it was clearly in RBC's interest to assert that financing would not be available from Mr. Conant absent an injunction against Gannett. In the instant hearing, by contrast, it is equally clearly in RBC's interest to assert that Mr. Conant was always ready to provide funding.

and, in any event, unavailing. The evidence establishes that, even if Mr. Conant had committed to fund RBC's construction and initial operation, that commitment (and the funds to be derived therefrom) were not available to RBC at least during the period November, 1990 - June, 1991, and Mr. Rey was aware of that non-availability during all of that time period. If all the testimony and other evidence were viewed in the light most favorable to RBC, the most that could be said would be that Mr. Conant's willingness to provide funds was always in place, but could not and would not be called upon unless and until Mr. Rey believed in the viability of constructing and operating RBC's station and so advised Mr. Conant. E.g., Tr. 918, 922, 924-25. In other words, Mr. Conant's supposed commitment was subject to a condition that Mr. Rey advise Mr. Conant that Mr. Rey was convinced of the viability of the project. ^{29/}

100. But if that condition were, in fact, operative during the period November, 1990 - June, 1991, then Mr. Conant's commitment was not available to RBC because, according to Mr. Rey's own repeated testimony, Mr. Rey was convinced -- in December, 1990 and January, 1991, and consistently through approximately June, 1991, at least, e.g., Tr. 917 -- that it would be "worthless" for RBC to undertake construction and operation of its station. E.g., Tr. 780-81, 790, 872, 888, 916,

^{29/} It bears repeating that the notion of such a condition is inconsistent both with the testimony offered by Mr. Rey in the Miami Tower Litigation and with the Conant Declaration offered by RBC in its Partial Motion for Summary Decision herein.

989. Further, the testimony also clearly indicates that, at no time prior to late 1993, at the earliest, did Mr. Rey ever notify Mr. Conant that the project was, in Mr. Rey's view, viable. See Tr. 908-909. ^{30/}

101. As a result, the condition requiring a favorable assessment of the project's viability could not be met during the period November, 1990 - June, 1991, and the supposed Conant financing could not be deemed to have been available during that time period. It should be emphasized that, since this non-availability may reasonably be attributed to the fact that Mr. Rey, in his own private judgment, deemed the RBC project to be "worthless" or not "viable", then RBC's lack of funding was wholly within RBC's control. That is, in that case the lack of funding was a direct result of Mr. Rey's (and RBC's) reluctance to avail himself/itself of Mr. Conant's supposed financing because of a concern about the likely competitive environment. E.g., Tr. 918, 922, 924-25.

^{30/} Mr. Rey testified that he told Mr. Conant that RBC's permit was "free and clear" in the second half of 1993. Tr. 908-09. The term "free and clear" as used by Messrs. Rey and Conant appeared to have multiple meanings. In normal usage, a "free and clear" permit would be a permit the grant of which has become final. RBC had such a permit as of August 30, 1990. Jt. Exh. 1, ¶11. However, as used occasionally by Mr. Rey, the term "free and clear" appeared also to mean either that the Miami Tower Litigation had been resolved favorably to RBC, see Tr. 742-43, or that the permit was not "about to expire", Tr. 742, or that no challenges were pending with respect to the permit, see Tr. 742. Notwithstanding all of these various meanings, Mr. Rey testified that he believed that RBC's permit was "free and clear" as of late 1993, Tr. 908-09 -- although the grant of the extension of the permit was not, at that point, final (and still, to date, has not become "final").

102. Again, the evidence establishes that, at least during the period November, 1990 - June, 1991, RBC did not have any financial commitment ^{31/} enabling it to construct and operate its station. Moreover, the evidence establishes that Mr. Rey was personally aware of that fact at that time.

IV. Section 73.3598(a)/Section 73.3534(b) Issue

103. The evidence adduced with respect to the two issues addressed above (i.e., the Failure to Construct Misrepresentation/Lack of Candor Issue and the Financial Misrepresentation/Lack of Candor Issue) relates as well to the issue concerning whether a waiver of Section 73.3598(a) or an extension pursuant to Section 73.3534(b) was warranted. Accordingly, the findings of fact set forth above are hereby incorporated herein by reference. In addition, the following evidence is relevant to that issue.

104. In neither RBC's January, 1991 nor its June, 1991 extension application did RBC represent to the Commission that RBC had completed construction or that it had made substantial progress in that regard. Jt. Exh. 2 and 3. ^{32/} The sole basis for the failure to construct cited in either of those

^{31/} Mr. Rey acknowledged that Mr. Conant was the only source of funding available to RBC as of January, 1991. Tr. 902-03. See also Press Exh. 10, p. 9.

^{32/} Indeed, it is clear from RBC's two applications that RBC had not even selected equipment as of June, 1991, despite the fact that, as of that time, RBC had held the permit for some five years, and grant of the permit had been final for almost ten months. Jt. Exh. 2, 3; Jt. Exh. 1, Paragraphs 4, 11.

applications, as originally filed, was the pendency of the Miami Tower Litigation. Id. Since the June, 1991 extension application was filed after Judge Marcus had denied RBC's request for injunctive relief in the Miami Tower Litigation ^{33/}, RBC could not rely, in that application, on that excuse for any further failure to construct. Accordingly, RBC represented to the Commission that RBC was moving forward with construction (including equipment selection). Jt. Exh. 3, p. 3. According to that application,

Rainbow will commence operation prior to December 31, 1992, as it previously informed the Commission.

Id. Even though Press' petition for reconsideration of the grant of the January, 1991 extension application was still pending as of the filing of the June, 1991 extension application, RBC did not give any indication, in that latter application, that its unequivocal commitment to complete construction by December, 1992 was in any way conditioned upon favorable resolution of the issues raised by Press. Id.

105. On November 27, 1991, RBC supplemented its June, 1991

^{33/} In its January, 1991 and June, 1991 extension applications, RBC referred merely to a "dispute" with its tower owner which was "the subject of legal action". Jt. Exhs. 2 and 3. That would appear to refer to the Miami Tower Litigation. However, Mr. Rey testified that RBC had "decided" to go forward with its construction in approximately June, 1991, Tr. 872, at which time the Miami Tower Litigation was still on-going. It may be that RBC's reference to a "dispute" may have been to the injunctive relief request which RBC had advanced as part of the Miami Tower Litigation. See Press Exh. 9. While that aspect of the Miami Tower Litigation was resolved (unfavorably to RBC) at approximately the time that RBC "decided" to proceed with construction, however, Mr. Rey testified that that factor did not influence RBC's decision to proceed. Tr. 990-992.

extension application to notify the Commission that RBC was "proceeding with construction". Jt. Exh. 5, p. 1. In that Supplement, RBC advised that it was still engaged in equipment selection. RBC also stated, unequivocally, that it anticipated that "the station will be operational by December, 1992." Id. at p. 2. RBC's November, 1991 Supplement included no indication that RBC's commitment to construct by December, 1992 was in any way conditioned upon favorable resolution of the issues which had been raised by Press (in its February, 1991 petition for reconsideration and its July, 1991 objection to the June, 1991 extension application) and which were still pending as of November, 1991. Jt. Exh. 5. ^{34/}

106. On November 29, 1991 -- two days after submission of its Supplement to the June, 1991 extension application -- RBC filed its assignment application, Press Exh. 18. Again in that assignment application RBC represented that it would commence operation of the station by December, 1992. Id., p. 3. Again, too, RBC did not condition that representation on favorable resolution of the then-pending issues which had been raised by Press. Id. Also, RBC did not amend its June, 1991 extension application to state, or even suggest, that the commitment to

^{34/} Despite the fact that RBC's November, 1991 supplement to its June, 1991 extension application contained absolutely no indication that RBC's commitment to proceed was subject to any conditions whatsoever, Mr. Rey asserted during his testimony that that commitment was in fact contingent on grant of the June, 1991 application. Tr. 875-76. Given a copy of the November, 1991 supplement, however, Mr. Rey was unable to point to any language at all in that supplement reflecting any such condition. Tr. 877-79.

construct by December, 1992 set forth (repeatedly) in the June, 1991 extension application would be affected in any way by the submission of the November, 1991 assignment application.

107. Contrary to its repeated representations, RBC did not construct its station by December, 1992. In March, 1993, Mr. Pendarvis, the Chief of the Television Branch, wrote to RBC inquiring about the status of construction. Jt. Exh. 6. In response, RBC advised the Commission that

[u]ntil the [assignment application] is acted upon, [RBC] cannot use the limited partnership funds to effect construction.

[RBC] has . . . sufficient committed funds to purchase the equipment, construct the station and operate without revenue for the required initial period. Release of those funds is tied to F.C.C. approval of the transfer of the permit to [RBL].

Jt. Exh. 7, p. 5.

108. In their June, 1996 testimony in this proceeding, Messrs. Rey and Conant both testified that Mr. Conant had, in 1991, agreed to provide RBC a form of bridge financing to assist RBC even if RBC elected to rely, ultimately, on equity financing in the form of a limited partnership. E.g., Tr. 677-78; 900-01. While Mr. Rey asserted that Mr. Conant's bridge financing would be available only if RBC's assignment application were granted, Tr. 900, Mr. Conant indicated that his willingness to provide financing did not depend at all on whether any limited partnership was formed, Tr. 677.

109. Mr. Rey testified that RBC's construction permit was free and clear as of August 30, 1990. Tr. 730. According to

Mr. Rey, the permit remained "unexpired and valid" to August 5, 1991. Tr. 980, 983. Press' initial objection to RBC's January, 1991 extension application was filed on February 15, 1991. Jt. Exh. 1, Paragraph 15. Thus, RBC had from August 30, 1990 to February 15, 1991 -- a period of almost six months -- within which RBC's permit was final and not subject to any challenges at all at the Commission, and RBC had from August 30, 1990 to August 5, 1991 -- a period of almost 12 months -- within which its permit was "unexpired and valid".

110. Mr. Rey testified that in 1993-1994, following the reinstatement and grant of RBC's June, 1991 extension application and November, 1991 assignment application, RBC was actually able to construct its station in seven and one-half months. Tr. 981-82. RBC had previously estimated to the Commission that construction would take only six months. Jt. Exh. 7, pp. 5-6. Thus, had RBC actually commenced construction immediately after the grant of its permit became final in August, 1990, and had it maintained the construction schedule which it ultimately utilized, RBC would have completed construction substantially prior to the August 5, 1991 expiration of its permit.

111. RBC did not undertake construction at all during the period August, 1990 - August, 1991. Mr. Rey testified that RBC's failure in that regard was attributable to the pendency of RBC's request for preliminary injunction in the Miami Tower Litigation. E.g., Tr. 731-33; 981. But the evidence establishes that RBC's failure to construct was attributable to RBC's own voluntary

decision not to build, a decision which was motivated exclusively by a desire to avoid what Mr. Rey repeatedly described as an unfavorable competitive, economic environment in which RBC's station (were it to have been constructed) would have been "worthless". E.g., Tr. 780-81, 790, 872, 888, 916, 989. See Paragraphs 55-59, supra.

112. Further, also as noted above, even if the Miami Tower Litigation had in any way precluded RBC from constructing -- and there is no evidence to support such a finding -- RBC could have removed that impediment by simply dismissing its Complaint with which RBC had initiated that litigation. Again, RBC chose not to dismiss its Complaint. According to Mr. Rey, while dismissal of the Complaint was possible, RBC's permit would, as a result, have been "worthless" and Mr. Rey "would have chosen maybe to give it back to the FCC". Tr. 888.

113. The evidence clearly demonstrates that RBC's failure to construct from August, 1990 - August, 1991 was attributable to RBC's own voluntary election, an election motivated solely by a desire to avoid an unfavorable competitive environment.

V. Ex Parte Issue

114. It has been established, by the Commission and the Court of Appeals, that RBC's meeting with Bureau staffpersons on July 1, 1993, and RBC's request that Ms. Bush contact the staff prior to that meeting (as well as Ms. Bush's contacts with the staff pursuant to that request), were in violation of the Commission's ex parte rules. Jt. Exh. 10, p. 5, ¶22; Press

Broadcasting Company, Inc. v. FCC, 59 F.3d at 1370. Under the Ex Parte Issue set forth in the HDO, the only remaining question is whether that violation was intentional. Intent, of course, may be determined through analysis of relevant facts and circumstances. E.g., David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991). In the instant case, a number of facts and circumstances are relevant to the determination of intent in question.

A. The Sandifer Letter

115. The letter from Mr. Sandifer (Jt. Exh. 4) clearly states that RBC's construction permit was a "restricted" proceeding within the meaning of Section 1.1208 of the Commission's Rules. According to the letter, Mr. Sandifer's conclusion in that regard was based on the fact that there were pending with respect to RBC's construction permit a petition for reconsideration, filed in February, 1991, and a further objection, filed in July, 1991. Jt. Exh. 4. The only pleadings which had been filed with respect to the RBC permit had been filed by Press. Tr. 411. As a result, Mr. Sandifer's conclusion that the proceeding was "restricted" was based on the pendency of Press' pleadings.

116. Ms. Polivy received and read a copy of Mr. Sandifer's letter at approximately the time it was sent out, i.e., October, 1991. Tr. 383. She testified that she did not believe either that it applied to RBC or that it precluded RBC from engaging in any communications with the Commission's staff. Id. Rather, she

believed that any restrictions applied only to Mr. Daniels (the addressee of Mr. Sandifer's letter) and any other non-RBC "third parties", such as Press. Id. She claimed that her belief was based on her understanding of a note to Section 1.1204 of the Commission's Rules. Id.; Rainbow Exh. 1. However, that rule is not cited in Mr. Sandifer's letter.

117. Ms. Polivy testified that, when she received Mr. Sandifer's letter, she did not review Section 1.1208, which is cited in Mr. Sandifer's letter. Tr. 410. Section 1.1208, which defines "restricted proceedings" for purposes of the Commission's ex parte rules, provides in relevant part that a proceeding is "restricted" when it is "formally opposed". ^{35/} Since the only oppositions which had been filed with respect to the RBC extension applications were Press', Tr. 411, Mr. Sandifer's conclusion that the proceeding was "restricted" under Section 1.1208 clearly means that Press' pleadings were deemed to be "formal oppositions" within the meaning of Section 1.1208.

118. The note to Section 1.1204 which Ms. Polivy claims she thought to be applicable does not, by its own terms, apply to parties which have filed "formal oppositions". Rainbow Exh. 1. Since Press' pleadings had been found, by Mr. Sandifer, to have

^{35/} Applications are also "restricted" when they are designated for hearing or when they are the subject of one or more mutually exclusive applications. Section 1.1208. Ms. Polivy testified that as of October, 1991, the RBC extension applications had not been designated for hearing and was not subject to any mutually exclusive applications. Tr. 410.

been "formal oppositions", any claim of reliance on Section 1.1204 would have been erroneous. Moreover, the legitimacy of Ms. Polivy's claimed reliance on Section 1.1204 is questionable in view of the fact that RBC conceded, in a pleading filed with the Commission on August 26, 1993, that the RBC applications were properly characterized as a "restricted" proceeding in Mr. Sandifer's letter, Press Exh. 5, p. 3 -- a concession which, in light of the definition of "restricted proceedings" in Section 1.1208 (and the limited nature of the exemption set out in Section 1.1204) established that RBC was, or should have been, aware that Section 1.1204 was plainly not applicable to the RBC applications.

119. Ms. Polivy did not seek any clarification of Mr. Sandifer's letter -- or its conclusions concerning the "restricted" nature of the proceeding or the applicability of the ex parte rules thereto -- from Mr. Sandifer or anyone else at the Commission. Tr. 411.

B. The Gordon Telephone Calls

120. Several months prior to July, 1993, Ms. Polivy telephoned Paul Gordon, the Bureau staff attorney who was processing RBC's then-pending June, 1991 extension and November, 1991 assignment applications (as well as the still-pending Press petition for reconsideration concerning the grant of RBC's January, 1991 extension application). Tr. 1016-18. According to Mr. Gordon, Ms. Polivy called him at least three or four times

prior to July 1, 1993. Tr. 1018. ^{36/} In each conversation, Ms. Polivy began by inquiring about the status of the applications, but then sought to engage in discussion of the merits; in each conversation, Mr. Gordon advised her that he understood the RBC applications to be "restricted" under the ex parte rules, as a result of which he could not engage in such discussion; in each conversation, Ms. Polivy expressed her disagreement with Mr. Gordon's interpretation of the applicability of the ex parte rules; and, as a result, Mr. Gordon was compelled to terminate each conversation. Tr. 1019-21.

121. For her part, Ms. Polivy acknowledged that she called Mr. Gordon a number of times, but she denied ever attempting to discuss the merits of the applications. Tr. 504-511. She also denied that Mr. Gordon ever said anything to her during these conversations concerning the applicability of the ex parte rules. Id. Ms. Polivy did acknowledge, after a fair amount of probing by the Presiding Judge, that her calls were "aggressive status calls". Tr. 508. When the Presiding Judge suggested that "aggressive status calls" entailed some discussion of the resolution of the issues then before Mr. Gordon, Ms. Polivy denied that suggestion. Tr. 509. According to her, in her "aggressive status calls" she

tried to impress upon [Mr. Gordon] that all the pleadings were in. There was no reason why we couldn't

^{36/} Billing ledgers produced by the firm of Renouf & Polivy indicate at least four telephone conversations with Mr. Gordon between March 26, 1993 and July 1, 1993, with three of the calls in June, 1993. Press Exh. 2.

get a decision out on this thing.

Id.

122. The Presiding Judge also noted that, if Ms. Polivy's understanding of the ex parte rules was that she (as RBC's counsel) was at liberty to discuss the merits of the matter -- as she had testified was her understanding -- then she should have felt free to do so. Tr. 505. In response, Ms. Polivy said that she "had no reason to" discuss the merits with Mr. Gordon, since she "could not conceive . . . that the Commission staff would ever deny those extensions of time." Id. However, by letter dated March 22, 1993 -- significantly before her calls to Mr. Gordon -- Mr. Pendarvis had written to RBC notifying it that the Commission's staff "cannot conclude that grant of the [RBC] extension application would serve the public interest." Jt. Exh. 6. Mr. Pendarvis' letter substantially undermines the credibility of Ms. Polivy's testimony that she had no reason to believe that the staff might not grant RBC's applications.

123. The testimony of Ms. Polivy directly conflicts with that of Mr. Gordon. He says that, during their conversations (which both acknowledge occurred), she sought to discuss the merits of the applications; she says she did not. He says that, during those conversations, he advised her that the applications were a "restricted proceeding" within the meaning of the ex parte rules; she says he did not.

124. Under the circumstances presented here, Mr. Gordon's testimony was substantially more credible than Ms. Polivy's, and

it is credited. Mr. Gordon was a credible witness who responded directly and forthrightly to questions. He had no apparent motive to lie. ^{37/} His testimony had the ring of truth.

125. By contrast, Ms. Polivy was less than credible. Her claim that she engaged in repeated "aggressive" calls to Mr. Gordon but that she did not, in so doing, seek to address the merits, is inherently incredible. This is especially so in view of her claim that she did not view herself to be prohibited by the ex parte rules from engaging in merits-related discussions. While she asserted that she did not believe there was any need to address the merits, the evidence clearly shows that Mr. Pendarvis' March 22, 1993 letter, which predated at least three or four of Ms. Polivy's conversations with Mr. Gordon, by its own express terms placed Ms. Polivy on notice that the Bureau's staff did not believe that RBC's application could be granted. Thus, Ms. Polivy's claim of absolute confidence in RBC's case flies in the face of the available documentary evidence.

126. Moreover, an admission by Ms. Polivy that Mr. Gordon

^{37/} In a pleading which RBC submitted to the Commission in March, 1994, Ms. Polivy denied Mr. Gordon's earlier statements, to the Commission's Office of Inspector General ("OIG"), which were consistent with his testimony here. Press Exh. 3. In her March, 1994 pleading, Ms. Polivy suggested that Mr. Gordon was engaged in "recollection by animus" and "fantastical post hoc recollections. Id. On cross-examination, Ms. Polivy confirmed that she continues to believe that Mr. Gordon may be guilty of "recollection by animus". However, the record contains no evidence at all which would support such a belief, and the notion that Mr. Gordon's testimony may have been motivated by "animus" or that Mr. Gordon may have "fantasized" the conversations is hereby rejected.

did advise her, directly and repeatedly, of the ex parte restrictions applicable to the RBC would largely, if not completely, undermine any claim that she or RBC might make that RBC's ex parte violations in June-July, 1993 were unintentional. Thus, Ms. Polivy has an obvious motive for being less than honest and candid with respect to her conversations with Mr. Gordon.

127. In view of the evidence, it is found that, on at least three or four separate occasions between March 26, 1993 and July 1, 1993, Mr. Gordon specifically advised Ms. Polivy that the RBC applications constituted a "restricted" proceeding within the meaning of the Commission's ex parte rules. It is also found that, as of the time that she learned of Ms. Kreisman's letter and initiated the ex parte communications with the Bureau staffmembers, Ms. Polivy had been advised at least four or five times -- once by Mr. Sandifer, in his letter, and at least three or four times by Mr. Gordon in his telephone conversations with her -- that the proceeding was restricted within the meaning of the Commission's ex parte rules. At no time did Ms. Polivy seek any alternate opinion with respect to that question from any other Commission staffperson. Tr. 411.

C. The Bush Calls

128. Ms. Polivy recalled that she was advised by Mr. Gordon on June 24, 1993, of the substance of Ms. Kreisman's June 18, 1993 letter denying RBC's June, 1991 extension application. Tr. 433. Ms. Polivy received a copy of Ms. Kreisman's letter by mail on June 28, 1993. Tr. 434. Available documents establish

that Ms. Polivy immediately enlisted the aid of Ms. Bush to contact the Commission's staff. The Renouf & Polivy billing ledger (copies of which were produced during discovery) contains an entry for June 28, 1993 which reads "TONI 1/4 + 1/4 + 1/4". Press Exh. 2. Ms. Polivy confirmed that "Toni" referred to Ms. Bush. She also confirmed that this entry could mean that she had three separate conversations with Ms. Bush on June 28, 1993. Tr. 435. The Renouf & Polivy billing ledger also contained an entry for June 29, 1993 which reads "TONI 1/4 + 1/4". Press Exh. 2. Ms. Polivy confirmed that that could indicate two separate conversations between her and Ms. Bush on that date. Tr. 435. ^{38/}

129. While Ms. Polivy attempted to discount the meaning of the billing ledger entries, Press Exh. 2, she was also shown a record of her law firm's long distance telephone calls placed to Ms. Bush's home telephone in New York ^{39/} during the period in question. Press Exh. 4. While Ms. Polivy claimed not to be able to determine from this phone bill and the corresponding billing

^{38/} Ms. Polivy testified that entries on the billing ledger might not reflect actual conversations. According to Ms. Polivy, an entry of, for example, "TONI 1/4" might mean that Ms. Polivy "tried to contact her and talked to her answering machine." Tr. 435. However, she also testified that such an entry could reflect a 15-minute telephone conversation. Id.

^{39/} In June, 1993, Ms. Bush was at home in New York on maternity leave. Tr. 572, 576-77. The telephone bill received into evidence (Press Exh. 4) reflects six calls in the period June 28-30, 1993 from Renouf & Polivy to Ms. Bush's home phone: one call, 48 seconds in length, placed on June 28; four calls, ranging in length from 30 to 42 seconds, on June 29; and one call, approximately 10 minutes in length, on June 30.

ledger precisely how many times she spoke with Ms. Bush on June 28-30, it is found that the two spoke at least three, and more likely as many as four or five times during that period. ^{40/}

130. As noted, upon learning of the denial of RBC's June, 1991 extension application, Ms. Polivy sought to enlist Ms. Bush's assistance. Ms. Bush was, at the time, counsel for the Senate Committee on Commerce and Transportation, and was particularly involved with the Communications Subcommittee of that Committee. Tr. 553. Ms. Polivy acknowledged that having Ms. Bush contact the Commission's staff could have served as a means of applying pressure to the staff. Tr. 523.

131. While both Ms. Polivy and Ms. Bush claimed that, in contacting the Commission, Ms. Bush was only engaging in a "status" inquiry, e.g., Tr. 523-34, 572, neither could explain why such a "status" inquiry was necessary, e.g., Tr. 516-24, 585-

^{40/} Ms. Polivy and Ms. Bush both testified that Ms. Polivy called Ms. Bush and informed her of Ms. Kreisman's decision to deny RBC's June, 1991 extension application. Tr. 444, 557. Within a day of that initial conversation, Ms. Bush contacted Mr. Stewart, and then called Ms. Polivy back to report on that contact. Tr. 561. Shortly thereafter, at Mr. Stewart's request, Mr. Pendarvis called Ms. Bush, Tr. 561, and after that, Ms. Bush again called Ms. Polivy to report on her conversation with Mr. Pendarvis, Tr. 562. That would account for three conversations on June 28-29. The 10-minute conversation reflected on the Renouf & Polivy telephone bill (Press Exh. 4) could have been a call from Ms. Polivy to Ms. Bush advising her that a meeting had been scheduled in Mr. Stewart's office. Tr. 460.

89. ^{41/} The term "status inquiry" connotes an inquiry as to the particular status of a pending matter at the agency. But when Ms. Polivy enlisted Ms. Bush to contact Commission personnel, Ms. Polivy already knew the status of RBC's applications, because she had received Ms. Kreisman's June 18, 1993 letter. Thus, she had no need to ask, or to have Ms. Bush ask, about the "status" of the applications. Moreover, since those applications had already been disposed of by Ms. Kreisman's letter, there was nothing then pending for Commission consideration, so as a practical matter, there was no legitimate need at all for any "status inquiry".

132. Ms. Polivy was examined with respect to her claim that she expected Ms. Bush to make a "status" inquiry. It is apparent from her responses that, contrary to her claim, Ms. Polivy intended to achieve more than merely learning "status" information through Ms. Bush. Ms. Polivy testified that the

^{41/} Ms. Bush explained, on redirect examination, that a post-decision call to the staff would be an appropriate "status" call if it was for the purpose of asking "why they reached a particular decision" so that she might learn the "implications" and "precedential value" of the decision. Tr. 591. However, she also acknowledged that, at the time of her conversations with Messrs. Stewart and Pendarvis, she had no idea of what Ms. Kreisman's decision said, Tr. 592; indeed, she testified that Ms. Polivy had asked her to call the Commission to find out "why [RBC's application] had been denied", Tr. 557 (an odd request, since Ms. Polivy already had a copy of Ms. Kreisman's letter setting forth the basis for her decision). Thus, even if her own understanding of the proper limits of a "status" call were valid -- and there is no reason to assume that it is valid -- her ignorance of the Kreisman letter demonstrates that her conversations with Messrs. Stewart and Pendarvis would not have fallen within that understanding, since she could not possibly have been exploring "implications" or "precedential value" of a decision about which she knew nothing.

purpose of Ms. Bush's call, in Ms. Polivy's view, was "to get the attention of the senior staff" of the Bureau so that they would look at any RBC petition for reconsideration "seriously".

Tr. 519. Questioned as to whether she felt that any such petition might not stand on its own merits, she expressed concern that, absent some intervention, the petition would not be processed by the staff in a way suitable to Ms. Polivy. Tr. 520.

133. When the Presiding Judge pointed out to Ms. Polivy, again, that there was no reason to "find out what the heck was going on", she responded, "But how could the[y] come out with such a decision?" Tr. 521. While that response suggested that Ms. Polivy intended Ms. Bush to get into the merits (as opposed to merely the status) of the matter, Ms. Polivy claimed that she did not expect Ms. Bush to involve herself in changing the decision, although "in my mind there would have been nothing wrong with her doing that." Id. But since Ms. Bush was a third party, such involvement would have been prohibited by Ms. Polivy's own interpretation of the ex parte rules, just as Mr. Daniels (the addressee of Mr. Sandifer's letter) had been prohibited, according to Ms. Polivy. See Paragraph 116, supra.

134. When Ms. Polivy was asked why Ms. Bush would be any different from Mr. Daniels, the following colloquy occurred:

Polivy: I don't know whether she is or not [different from Mr. Daniels].

ALJ: Well, why would she not be? She didn't represent Rainbow.

Polivy: Well, because that's, in effect, a status call, and as far as I know congressional status calls

are always in order.

ALJ: Well, what was the status call? The decision had been rendered. So I am still trying to find out what is the status call that you wanted to find out about? There wasn't anything pending at the time for her to find out about, was there?

Polivy: I didn't say anything about the status.

Tr. 522. Again, Ms. Polivy attempted to suggest that Ms. Bush was making a status call ("that's, in effect, a status call"), although she quickly retreated from that claim when she was unable to explain why any "status" call might have been necessary or appropriate ("I didn't say anything about the status").

135. Questioned further on this subject, Ms. Polivy repeated that she asked Ms. Bush to "find out what was going on over there." Tr. 523. By this, according to Ms. Polivy, she meant:

what was going on, who made the decision. Was this a decision made in the chief of the Bureau's office? Was this something that he was aware of because it was contrary to -- had the Commission changed the laws suddenly? This is certainly something that was different from anything they had ever done.

Tr. 523-24. She did not consider a contact by Ms. Bush to this effect to be different from a status call. Tr. 524. But she added that she believed that even if it was not a status call, it would have been permitted. Tr. 524. Reminded of her interpretation of the Sandifer letter, which was inconsistent with this position, Ms. Polivy testified that the Sandifer letter was not "an active part of my thought process in this." Id.

136. At Ms. Polivy's request, Ms. Bush called Mr. Stewart. Tr. 571. As reflected in the opinion of the Court of Appeals,